(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THERESA L. HERMES,

Petitioner,

v.

THE STATE OF NEBRASKA, Acting Through The Department of Public Institutions, WESTERN NEBRASKA VETERAN'S HOME,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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14 pp

QUESTION PRESENTED

Whether Title I of the Americans With Disabilities Act, 42 U.S.C. Section 12111 to 12117 (1995 & Supp. 2000), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

PARTIES TO THE PROCEEDING

Petitioner, Theresa Hermes, is a citizen of the State of Nebraska, she was plaintiff in the district court and an appellee in the court of appeals.

Respondent is the State of Nebraska.

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PETITION FOR A WRIT OF CERTIORARI

Vincent M. Powers, on behalf of Theresa Hermes, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is unpublished at Case No. 99-3797NEL. The opinion of the district court (App., *infra*, 16a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). 28 U.S.C. Section 2403(a) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment:

The judicial power of the United States shall not be construed to extend to any suit or law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

2. The Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

3. Section 12101(b)(4) of Title 42:

It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

4. Section 12112(a) of Title 42:

General rule – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other conditions, and privileges of employment.

5. Section 12202 of Title 42:

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction

for violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including both at law and in equity) are available for such violations to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

STATEMENT

1. Title I of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. Section 12101 *et seq.*, renders it unlawful for covered entities to discriminate against the disabled in the terms and conditions of their employment. 42 U.S.C. Section 12112(a). A "covered entity" is defined to include any "person engaged in an industry affecting commerce who has 15 or more employees", 42 U.S.C. section 12111(2) and (5)(A), and the term "person" incorporates the definition from Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, which includes States. 42 U.S.C. Section 12111(7); cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 & n.2 (1976). The ADA specifically mandates that States are not immune from liability. 42 U.S.C. Section 12202.

2. Plaintiff Theresa Hermes was employed by the Defendant, State of Nebraska on July 26, 1994, as a part-time night supervisor. On or about May 9, 1996, Plaintiff applied for a promotion to her job as a full-time nurse supervisor. On May 23, 1996, Plaintiff was advised that a less qualified non-disabled male candidate was selected to fill the position of nurse supervisor. In September of 1995, the Plaintiff had suffered a seizure and in October

or November of 1995, Plaintiff had been prescribed medication which effectively controlled her seizures. The Plaintiff had also been taking medication for depression.

On or about May 23, 1996, Plaintiff met with her supervisors to inquire as to why she was not promoted. Theresa Hermes was wrongly accused of having a hostile attitude by her supervisors. Afterwards Plaintiff was retaliated against according to her allegations by the Defendant. Theresa Hermes filed suit alleging a violation of Americans With Disabilities Act and retaliation.

REASON FOR GRANTING THE PETITION

On April 17, 2000, this Court granted review in the *University of Ala. at Birmingham Bd. of Trustees v. Garrett*, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S.Ct. 1669 (U.S. Apr. 17, 2000) (No. 99-1240). In regard to Title I of the ADA, the issue of the Act's abrogation of Eleventh Amendment immunity presented in this petition is identical to the question presented in the aforementioned case. Accordingly, because the issues are identical in this case, this petition should be held pending the court's decision in *University of Ala. at Birmingham Bd. of Trustees v. Garrett*, No. 99-1240 and disposed of in accordance with the decision in that case. In the alternative, this court should grant certiorari and reverse the decision below.

CONCLUSION

This petition for a writ of certiorari should be held pending this Court's decision in *University of Ala. at Birmingham Bd. of Trustees v. Garrett*, No. 99-1240, and disposed of in accordance with the decision in that case. In the alternative, this Court should grant certiorari and reverse the decision below.

Respectfully submitted.

VINCENT M. POWERS
Counsel of Record for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3797

Theresa L. Hermes, Appellant, v. State of Nebraska, acting through the Department of Public Institutions, Western Nebraska Veterans' Home, Appellee.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska. **[UNPUBLISHED]**

Submitted: July 31, 2000
Filed: August 3, 2000

Before BEAM, FAGG, and LOKEN, Circuit Judges.

PER CURIAM.

Theresa L. Hermes commenced this action alleging violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112, *et seq.*, by the State of Nebraska Department of Public Institutions. The district court[1] dismissed the action, and denied Hermes's motion for a new trial,

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[1] The HONORABLE RICHARD G. KOPF, Chief Judge, United States District Court for the District of Nebraska.

based upon this court's decision that the States and their instrumentalities are entitled to Eleventh Amendment immunity from actions under Title II of the ADA. *See Alsbrook v. City of Maumelle,* 184 F.3d 999, 1010 (8th Cir. 1999) (en banc), *cert. dismissed,* 120 S. Ct. 1265 (2000). Hermes appeals. Concluding the district court properly applied our controlling decision in *Alsbrook,* and did not abuse its discretion in denying Hermes's motion for a new trial, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THERESA L. HERMES, Plaintiff, vs. STATE OF NEBRASKA, Defendant.	)))))))	4:98CV3036 **MEMORANDUM AND ORDER** (Filed Aug. 11, 1999)

This is an employment discrimination action pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12112 *et seq.* Pending before the court is Defendant's motion to dismiss, (filing 26), which asserts the state enjoys Eleventh Amendment immunity from such suits. As the question raised in Defendant's motion has been pending before the United States Court of Appeals for the Eighth Circuit, this case has been stayed in this court.

On July 23, 1999, the Eighth Circuit rendered its decision in *Alsbrook v. City of Maumelle*, 1999 WL 521709. And as that opinion is dispositive of Defendant's motion, I find Defendant's motion to dismiss must be granted, and Plaintiff's complaint must be dismissed. The Eighth Circuit instructs that this court lacks jurisdiction to hear Plaintiff's claim for the reason the state is, in the Eighth Circuit's judgment, entitled to Eleventh Amendment immunity from suits brought pursuant to the ADA. *Alsbrook v. City of Maumelle*, 1999 WL 521709* 5 (8th Cir. July 23, 1999). *See also DeBose v. State of Nebraska*, slip op. 97-3541 (8th Cir. August 9, 1999); *McCullough v. State of Nebraska*, slip op. 97-3544 (8th Cir. August 9, 1999).

Accordingly,

IT IS ORDERED Defendant's motion to dismiss, filing 26, is granted and Plaintiff's complaint is dismissed.

DATED this 11th day of August, 1999.

BY THE COURT:

/s/ Richard G. Kopf
RICHARD G. KOPF
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
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v.

STATE OF NEBRASKA, Acting Through the Department of Public Institutions, WESTERN NEBRASKA VETERAN'S HOME,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals at issue is unpublished at Case No. 99-3797NE. The decision of the district court is unreported.

INTRODUCTION

Respondent, the State of Nebraska, submits this Brief in Opposition to the Petition for Writ of Certiorari. The Petition asserts that the Eighth Circuit's decision raises a question for this Court's review in terms of whether Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111 to 12117, constitutes a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment to abrogate the State's Eleventh Amendment immunity.

ARGUMENT

In the Petitioner's Petition for Writ of Certiorari the Petitioner acknowledges that her Petition for Writ of Certiorari raises the identical issue as the issue presented in *University of Alabama at Birmingham Bd. Of Trustees v. Garrett,* 193 F.3d 1214 (11th Cir. 1999), *cert. granted,* 120 S.Ct 1669 (U.S. Apr. 17, 2000) (No. 99-1240) and requests that her Petition be disposed of in accordance with the decision in that case. (Petition for Writ of Certiorari, p. 4). On February 21, 2001, this Court reversed the Eleventh Circuit Court of Appeals in *University of Alabama at Birmingham Bd. Of Trustees v. Garrett,* Case No. 99-1240, 2001 WL 173556 (Feb. 21, 2001). The Court held that Congress had

not properly abrogated the State's Eleventh Amendment immunity in enacting Title I of the ADA. Accordingly the Court determined that suits against a state by state employees for money damages for the state's failure to comply with the provisions of Title I of the ADA, are barred by the Eleventh Amendment of the United States Constitution. Based upon this being the sole question presented by the Petitioner, the Respondent opposes a grant of certiorari in this case and respectfully requests that the Petition for a Writ of Certiorari be denied.

CONCLUSION

The Respondent respectfully requests that the Petition for Writ of Certiorari be denied based upon this Court's decision in *University of Alabama at Birmingham Bd. Of Trustees v. Garrett*, No. 99-1240, 2001 WL 173556 (February 21, 2001).

Respectfully submitted,

STATE OF NEBRASKA, Acting Through the Department of Public Institutions, WESTERN NEBRASKA VETERAN'S HOME, Respondent,

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March 2001